the plaintiffs. He did not deny having signed the statement of account. He did not deny the construction of the fish ponds but said that he instructed Ong Chuan Huat and not the plaintiffs. The defendant in effect had said that he had dealings with Ong Chuan Huat and not with the plaintiffs, Ong Chuan Huat Sdn Bhd.

Ong Chuan Huat had affirmed that the fish ponds were built by the company. The various invoices were made in the name of the company.

Edgar Joseph Jr J in his judgment in the case of *Pacific Centre Sdn Bhd* v *United Engineers (Malaysia) Bhd*[1] quoted the judgment of Mustill J in the case of *Ninemia Maritime Corp* v *Trave Schiffahrtsgesellschaft mbH & Co KG*:[2]

> In my judgment, he (Lord Justice Kerr) was doing no more than reiterating that the plaintiff must always demonstrate a likelihood of success and was not prescribing the degree of likelihood. In these circumstances I consider that the right course is to adopt the test of a good arguable case in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than fifty per cent chance of success.

I agree with the test and applying the test I am satisfied that the plaintiffs have a good arguable case.

I need not deal with the second ingredient since it is not in issue.

For the third ingredient, I agree with Edgar Joseph Jr J when he stated in the *Pacific Centre's* case[1] that the test was to be as follows:

> I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant...

In this case the plaintiffs had produced the affidavits of Loo Kim Yeong and Sim Yam See both affirmed on 18 July 1988. Both had stated that the defendant had said that he intended to sell his properties and to move to Thailand.

The defendant in his affidavit denied that he ever intended to sell his properties and to leave Malaysia. Although he denied the truth of the affidavits the defendant did not consider it necessary to cross-examine the deponents on their affidavits. In my opinion there is sufficient evidence produced by the plaintiffs to show that there is a risk of the disposal of the defendant's assets.

For the above reasons I dismissed the defendant's application with costs.

Application dismissed.

Solicitors: *R Rajasingam & Co*; *Syarikat Abu Haniffa*.

Reported by *Ng Sheau Jiuan*

AMZ Corporation Sdn Bhd v Sye Ah Chai

HIGH COURT (IPOH) – ORIGINATING MOTION NO 32-44-87
ABDUL MALEK J
1 NOVEMBER 1988

Administrative Law – Order of certiorari against Industrial Court award – Non-disclosure of fact that applicant made reference under s 33A of the Industrial Relations Act 1967 and that Industrial Court consequently handed down award under s 33B when application for leave for order of certiorari was made – Applicant had applied for leave with 'unclean hands' – Motion dismissed – Alleged errors of law committed by Industrial Court – Merits of case – Industrial Relations Act 1967, ss 33A & 33B

The applicant applied to the court for an order of certiorari to quash an award of the Industrial Court on, inter alia, the following grounds: (a) the Industrial Court erred in law in failing to consider that the respondent and W were from different categories of employees carrying out different though occasionally overlapping work at different offices and in holding that the principle of 'first in last out' applied in respect of these different categories; (b) the Industrial Court had accepted the accounts produced by the respondent despite the fact that the maker was not called whereas for that same reason it had rejected the accounts submitted by the applicant and had therefore erred in law in applying different standards of proof required for the respondent and the applicant company; (c) the Industrial Court had acted in excess of jurisdiction in failing to take into consideration the duty of the respondent to mitigate his loss and by imposing an arbitrary figure of 10% towards mitigation for gainful employment.

In the course of the court hearing, it was disclosed that the applicant had not made known that it had actually made a reference under s 33A of the Act when it applied for leave for the writ of certiorari.

Held, dismissing the application:

(1) The award under s 33B was relevant to the issue and by failing to disclose the fact that it had actually made a reference under s 33A and that the Industrial Court had consequently handed down the award under s 33B when the application for leave was heard, the applicant had in fact applied for leave for the writ of certiorari with 'unclean' hands. On this score alone, the motion should be dismissed.

(2) The court can see no error made by the Industrial Court in holding that both W and the respondent were actually from the same category of 'workman' as both were actually clerks and that there was no reason for the more senior clerk of the two, namely, the respondent, to be retrenched first.

(3) As to the second contention, the Industrial Court did not apply different standards of proof as regards the production of accounts by both parties. This matter was not mentioned in the award and the applicant did not amplify on this defect in their affidavits. This ground must therefore also fail.

(4) As to the third ground, there is nothing to suggest that the Industrial Court had acted without or in excess of jurisdiction by awarding the respondent his pay for the full 17-month period from the date of dismissal to the date of award and by deducting 10% in mitigation towards gainful employment. In fact, in their decision, the Industrial Court had stated that this was the standard practice and these two issues were of not sufficient importance even to be referred to the High Court.

(5) Having carefully perused the written decision for the award and the facts of this case, the court was of the opinion

that the Industrial Court had not made any error of law which goes to its jurisdiction necessitating the issue of a writ of certiorari.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 442 of 1988.]

Cases referred to

1 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (refd)
2 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 30, 33A, 33B

Yeoh Choo Hor (Miss) for the applicant.
Kuppusamy Ponnusamy for the respondent.

Cur Adv Vult

Abdul Malek J: Leave had been granted to the applicant on 1 June 1987 to apply for an order of certiorari to remove into this court for the purpose of it being quashed Award No 144 of 1987 made on 28 April 1987 in Industrial Court Case No 1:3/4-362/86 on the following grounds:

(a) the Industrial Court acted without jurisdiction or in excess of jurisdiction and erred in law in holding that the principle of 'first in last out' applied in respect of two different categories of employees carrying out different though occasionally overlapping works at different offices;
(b) the Industrial Court acted in excess of jurisdiction when it erred in law in applying different standards of proof required for the claimant and the applicant company;
(c) the Industrial Court acted without or in excess of jurisdiction by failing to take into consideration the duty of the claimant to mitigate his loss and by imposing an arbitrary figure of 10% towards mitigation for gainful employment;
(d) the Industrial Court was wrong in law and acted in excess of its jurisdiction by ordering the company to contribute towards Employees Provident Fund when it does not contribute to the said fund but to the Malaysia Estate Staff Provident Fund;
(e) the Industrial Court acted in excess of its jurisdiction in holding that it has the power or discretion to control or interfere with the employer company's inherent right to determine its workforce; and
(f) the Industrial Court acted without jurisdiction in making an award which was wrong in law.

As regards the first ground, learned counsel for the applicant stated that the retrenched respondent had claimed that he had been dismissed because the applicant had failed to consider the principle of 'first in last out' in which case another clerk Woo Bee Lian (hereinafter 'Woo') should have been retrenched instead. Counsel went on to argue that the Industrial Court had failed to consider that the respondent and Woo were from two different categories as despite both being clerks, Woo not only prepared accounts of the head office, acted as secretary to the managing director, typed and generally performed duties of a secretary like taking phone calls and preparing coffee whereas the respondent was only a clerk at the estate office. In failing to so consider, learned counsel for the applicant reiterated that the Industrial Court had committed an error in law.

Concerning the second ground, the applicant's counsel submitted that the Industrial Court had accepted the accounts produced by the respondent despite the fact that the maker was not called whereas for that same reason it had rejected the accounts submitted by the applicant.

The third ground was as regards the imposition of the mitigation deduction of 10% although as counsel argued, there was no evidence tendered that the respondent had taken reasonable steps to get gainful employment. Further, counsel attacked the fact that the Industrial Court failed to consider the period of 17 months from the date of dismissal to the date the decision was given. By granting full pay for this period, counsel for the applicant stated that the Industrial Court had exceeded its jurisdiction through an error of law.

According to counsel for the applicant, the fourth ground was only a question of wrong wording while the fifth ground was abandoned by her in the course of submissions.

On the first ground, learned counsel for the respondent argued that it was the duty of the applicant to discharge the burden of departing from the principle of 'first in last out' before the Industrial Court which it had not done. As to the second ground as regards the rejection of the applicant's accounts, counsel pointed out that there was nothing in the award which stated that this was because the maker was not called. Further, the applicant had not elaborated on this ground in their affidavit.

On the third ground, counsel for the respondent submitted that it is settled law that the respondent need not mitigate his loss. He added that as submitted by the applicant's counsel, the fourth ground was only a matter of wrong wording and as regards the fifth ground it had been abandoned at the stage of arguments. In the event, he concluded that all the grounds had not been substantiated.

Counsel for the respondent further argued that the decision of the Industrial Court can only be quashed if the error of law goes to jurisdiction, for example, where there had been a violation of principles of natural justice, a no evidence decision or perverse decision and where the Industrial Court acted without jurisdiction or where it acted in excess of jurisdiction. This application by way of certiorari, he continued, was a disguised appeal and should be dismissed with costs as the Industrial Court award was right in law and one in which the Industrial Court had jurisdiction to make under s 30 of the Industrial Relations Act 1967 (hereinafter 'the Act').

One interesting point that cropped up during the submissions was the fact that the applicant had actually made a reference under s 33A of the Act and that the Industrial Court had consequently handed down the award under s 33B of the Act. This was done on 22 May 1987 before the application to the High Court for leave for the writ of certiorari on 25 May 1987 and as regards which they made no mention of the earlier s 33A application. The disclosure of this matter was objected to by counsel for the applicant but I held that the award under s 33B was relevant to the issue and by failing to disclose the fact, the applicant had in fact applied for the leave for the writ of certiorari with 'unclean' hands. In fact, on this score alone, I was of the opinion that the motion should be dismissed.

It is pertinent at this juncture to refer to s 33A of the Act which reads:

33A(1) Where the court has made an award under s 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law –
(a) which arose in the course of the proceedings;
(b) the determination of which by the court has affected the award;
(c) which, in the opinion of the court, is of sufficient importance to merit such reference; and
(d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.

(2) Where an application under sub-s (1) has been granted by the court, compliance with the award in respect of which the application has been granted shall be stayed pending the disposal of the reference by the High Court, unless the court otherwise directs in respect of the whole or a part of the award.

(3) An application under this section shall be made within thirty days of the date on which the award was made.

(4) Where a question has been referred to the High Court under this section, the court shall forward the record of its proceedings to the registrar of the High Court who shall thereupon appoint and notify to the parties to the proceedings the time and place for its hearing.

(5) The High Court shall hear and determine the question referred to it under this section as if the reference were an appeal to the High Court against the award of the court, and may, consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

(6) A decision of the High Court under subsection (5) shall have the same force and effect as an award of the court has under s 32, and may be enforced as if it were an award of the court.

(7) A decision of the High Court under subsection (5) shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever.

and to s 33B of the Act which is reproduced here for ease of reference:

33B(1) Subject to this Act and the provisions of s 33A, an award, decision or order of the court under this Act (including the decision of the court whether to grant or not to grant an application under s 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

(2) Subject to the provisions of s 33A, no award of the court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any court.

It is now relevant to refer to the Industrial Court decision on the reference by the applicant on the same grounds. It has been felt necessary to reproduce in full the decision of the Industrial Court on this reference to examine the relevancy of its disclosure by counsel for the respondent:

Decision

Parties were before the Industrial Court in Case No 1:3/4-362/86. After the hearing, Award No 144 of 1987 ('the award') was delivered by the court. The company is not satisfied with the award and applied under s 33A(1) of the Industrial Relations Act 1967 ('the Act') to refer the following points to the High Court:

(i) Did the Industrial Court err in law in holding that the principle of 'first in last out'applied in respect of two different categories of employees carrying out different though sometimes overlapping works at different offices.

(ii) Whether the Industrial Court erred in law in applying different standards of proof for the claimant and the company by accepting the unaudited records of the claimant and rejecting the evidence of the company's manager Mr Pah of losses incurred by the company.

(iii) Whether the Industrial Court erred in law by failing to take into consideration the claimant's duty to mitigate his loss of income from 1 October 1985 to 23 March 1987.

(iv) Whether the Industrial Court erred in law in exercising its discretion of imposing an arbitrary figure of 10% deduction towards mitigation without taking into account any mitigating factor.

(v) In making the order for payment and deduction towards Employees Provident Fund, the Industrial Court erred in law. The company and the claimant does not contribute to Employees Provident Fund but to a provident fund under the auspices of the Malaysia Estate Staff Provident Fund.

(vi) Whether the Industrial Court erred in law in holding that the company's right to determine its workforce could be interfered with or controlled by the Industrial Court.

Question (i) tries to suggest that the claimant and a clerk Miss Woo Bee Lian (CW2) are of different job categories and that there was no basis for the learned chairman to conclude that the principle of 'last in first out' was not correctly applied. At p 4 of the award, the learned chairman concluded that:

'They carried out almost identical duties except that the claimant was in the estate and Miss Woo Bee Lian was in the head office. Between the two, the claimant was the senior employee but he was retrenched.'

There may be a few additional functions performed by Miss Woo Bee Lian, like secretarial duties, but that does not make Miss Woo Bee Lian a kettle of fish different from the claimant. Both are clerks. If Miss Woo Bee Lian had shown her prowess as a secretary, she would have been upgraded to a secretary instead of remaining as a clerk. Even if there was any error, these can only be an error of fact, not of law and the question is not an appropriate one for reference to the High Court.

Question (ii) creates confusion. There was no loss suffered by the company. The unaudited accounts (exh CL-1) produced by the claimant was shown to the manager (CW1) of the estate and it was confirmed that the estate made a profit of R1,696,358.09. There is no question of different standards of proof being applied. This is not a proper question of law. Furthermore, it did not arise in the course of proceedings.

Questions (iii) and (iv) may be taken together. Both counsel were asked if claimant found work after he had been retrenched by the company and they replied they did not know as they were not before the learned chairman, neither did they apply for notes of evidence recorded by the learned chairman. It is standard practice in the Industrial Court to allow for a certain percentage (up to 50%) where a claimant has mitigated for loss of employment towards gainful employment. Here the learned chairman has deducted 10%. We do not think that these two questions are of sufficient importance to be referred to the High Court.

Question (v) points out some error in the award. Claimant contributed not to the Employees Provident Fund but to the Malaysia Estate Staff Provident Fund. At the time of complying with the award, it will be quite in order for the company to comply with the award by deducting its contributions to the Malaysia Estate Staff Provident Fund, in respect of the claimant, from the sum awarded. This is only a minor error of fact.

Question (vi) has been settled long ago. The right to hire and fire is now subject to the right to job security. This has been sufficiently elaborated in the award. The workman cannot now be 'dismissed without just cause or excuse' (s 20(1) of the Act). This question is not of sufficient importance to be referred to the High Court.

Encik P Kuppusamy for the claimant asked for costs under reg 5 of the Industrial Relations Regulations 1967. We see no good reason why we should depart from the practice of not granting costs and we will not order costs in this case.

Application dismissed.

Dated 17 July 1987

(Sgd) Fong Seng Yee
President

Let us now recapitulate on the sequence of events. The Industrial Court award was made on 28 April 1987. The applicant filed the reference under s 33A of the Act on 22 May 1987 and the leave for the writ of certiorari on 25 May 1987. Leave was accordingly granted on 1 June 1987 and the applicant filed the originating motion on 10 June 1987 for the writ of certiorari. No disclosure was made to the High Court as regards the reference to the Industrial Court under s 33A of the Act which was subsequently heard and decided on 17 July 1987 where the Industrial Court dismissed the application for reference to the High Court on a question of law. As I had stated earlier, the applicant should have made known this fact to the High Court when the application for leave was made and by failing to do so, and in fact objecting to the disclosure of this fact by counsel for the respondent on the date of submissions on 16 August 1988, the application for the writ of certiorari should be dismissed by reason of this non-disclosure and in view of the decision of the Industrial Court under s 33B of the Act.

Now, even assuming that there was no such application for reference to the High Court under s 33A of the Act, this court has scrutinized the award made by the Industrial Court on 28 April 1987. As regards the first ground, the Industrial Court had stated:

> Now assuming that the company had been experiencing an adverse trend in its business due to the poor crop output and the low price of rubber, as alleged by the company, did it then follow the principle of 'last in first out' in its retrenchment exercise? The claimant was no doubt the only clerical staff in the estate but it is in evidence that Cik Woo Bee Lian (CW2) was employed by the company in July 1984 as an office clerk at its head office in Ipoh. It was her evidence that apart from her job of keeping accounts at the head office and performing secretarial duties she also finalized the estate's accounts and the check-roll which were done by the claimant before his retrenchment.
>
> The claimant and Cik Woo Bee Lian (CW2) were both clerical staff. They carried out almost identical duties except that the claimant was in the estate and Cik Woo Bee Lian was in the head office. Between the two, the claimant was the senior employee but he was retrenched.

In another part of the award, the Industrial Court had said 'I am satisfied that the company had not followed the well-established principle of 'last in first out' when it retrenched the claimant'.

It is evident that the applicant has made a mountain of the fact that Woo performed more duties than the respondent as the former worked at headquarters and had additional functions as secretary to the managing director whereas the respondent was only a clerk at the estate office. Despite this fact, I can see no error made by the Industrial Court in holding that both Woo and the respondent were actually from the same category of 'workman' as both were actually clerks and that there was no reason for the more senior clerk of the two, namely, the respondent, to be retrenched first.

Concerning the second point, I agreed with the submissions of learned counsel for the respondent that the Industrial Court did not apply different standards of proof as regards the production of accounts by both parties. This matter was not mentioned in the award and the applicant did not amplify on this defect in their affidavits. This ground must therefore also fail.

On the third ground, there is nothing to suggest that the Industrial Court had acted without or in excess of jurisdiction by awarding the respondent his pay for the

full 17-month period from the date of dismissal to the date of award and by deducting 10% in mitigation towards gainful employment. In fact, in their s 33B decision on 17 July 1987, the Industrial Court had stated that this was the standard practice and these two issues were of not sufficient importance even to be referred to the High Court.

MP Jain in his book *Administrative Law in Malaysia and Singapore* at p 359 had commented that:

> Certiorari is issued when an adjudicatory body has infringed norms of natural justice, or acts under an invalid law, or commits errors of jurisdiction, or there is an error of law apparent on the face of the record, or where its decision is based on findings of fact for which there is no legal evidence to support.

Again, at p 360, he stated that:

> The jurisdiction of the High Court to issue certiorari is supervisory; it is neither appellate nor revisional jurisdiction. The High Court has emphasized the significance of this jurisdiction in the following words (in *Non-Metallic Mineral Products Manufacturers Employees Union* v *South East Asia Fire Bricks Sdn Bhd*): 'The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore, the jurisdiction may for convenience be described as an extraordinary original jurisdiction.'

The same author went on to state at p 367 that:

> Excess of jurisdiction or a jurisdictional error may arise in several situations. It may arise when a body is not properly constituted according to law. A body not properly constituted has no jurisdiction to act ... absence of jurisdiction may arise from the absence of some preliminary fact, or some particular fact collateral to the actual matter which the body concerned may have to try, and is a condition precedent to the assumption of jurisdiction by it. Such a fact is known as 'jurisdictional fact'.

At p 368 he reiterated that:

> Error of jurisdiction may also arise when the authority acts in excess of its powers, or it fails to exercise jurisdiction vested in it. If a tribunal bases its decision on extraneous considerations which it ought not to have taken into account, or fails to take into account a vital consideration which it ought to have taken into account, then certiorari may be issued to quash the decision. There is, however, a distinction to be drawn between 'an error of law within jurisdiction' and 'error of jurisdiction'. A writ is granted when an authority acts without jurisdiction or in excess of it, but not necessarily when it acts within jurisdiction but comes to a wrong decision. An error of law affecting jurisdiction is always reviewable. But in case of any other error of law, ie a non-jurisdictional error of law, not every error is reviewable. To be reviewable, a further element needs to be satisfied, viz the error of law must be apparent on the face of the record.

Finally at pp 377-378, he stated that:

> A finding of fact by a quasi-judicial body may also be quashed through certiorari if in arriving at the said finding, the decision-making body has erroneously refused to admit admissible and material evidence, or has erroneously admitted inadmissible evidence which has influenced the impugned finding.

The Privy Council in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors*[1] dealt with the *Anisminic* case[2] and a number of Malaysian case authorities on this point and stated:

> Their Lordships do not consider that these decisions in the Malaysian courts amount to a line of authority which could establish that certiorari is available to quash an award of the Industrial Court for a mere error of law on the face of the record. Some of them contain obiter dicta to that effect, but the decisions do not all speak with one voice. There appears to be no decision of the Federal Court or of this Board that is in point.
>
> A further reason for thinking that certiorari is effectively ousted in such a case is, in the opinion of their Lordships, to be found in s 53A of the Act (added by s 18(b) of the Industrial Relations (Amendment) Act 1971) which indicates that Parliament intended to exclude certiorari. Section 53A provides that the Industrial Court may, and shall if so directed by the Attorney General, refer any question of law to the Attorney General for his opinion and that it may make an award 'not inconsistent with the opinion'. The section is unusual in thus making the opinion of the Attorney General on a question of law effectively binding on the Industrial Court. It seems to be intended to keep questions which have been remitted to the Industrial Court away from the ordinary courts; otherwise it would have followed the more usual pattern of directing the court to state a case for the opinion of the High Court. It would be inconsistent with that intention that an award of the Industrial Court, giving effect to the Attorney General's opinion, should be liable to be quashed by the High Court for an error of law on its face. The reason for keeping questions remitted to the Industrial Court away from the ordinary courts may be that its functions are not purely judicial. For example, the Industrial Court is directed by s 27(4) of the Act of 1967, in making its award in respect of a trade dispute, to have regard to, inter alia, 'the financial implications and the effect of such award on the economy of the country, and on the industry concerned' and by sub-s (5) to 'act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form'. Whatever the policy underlying s 53A, it provides strong reinforcement for the view that awards of the Industrial Court are not subject to review by certiorari merely on the ground of error of law.

In that case they concluded that 'even assuming that the award contained one or more errors upon its face, the error or errors did not affect the jurisdiction of the Industrial Court and s 29(3)(a) (now 32(3)(a)) of the Industrial Relations Act 1967 effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings.'

It is relevant to note that the Privy Council referred to the Act as it was before its revision in 1976 and s 53A has now been replaced apparently by s 33A by amendments made in 1980 which provides that questions of law are no longer to be referred to the Attorney General but

to the High Court through the Industrial Court. The tenor of the remaining provisions of the Act, however, remain the same except for renumbering and therefore the Privy Council decision is still applicable.

On these considerations, I was of the view that the applicant had not made full disclosure of their application for reference under s 33A of the Act and the decision of the Industrial Court under s 33B of the Act and in any case, having carefully perused the written decision for the award and the facts of this case, was of the opinion that the Industrial Court had not made any error of law which goes to its jurisdiction necessitating the issue of a writ of certiorari.

In the event, the originating motion is dismissed with costs.

Application dismissed.

Solicitors: *Yeoh Kian Teik & Co*; *P Kuppusamy & Co.*

Reported by *Ng Sheau Jiuan*

Marka Industrial Sdn Bhd v Elgi Marka Sdn Bhd

HIGH COURT (IPOH) – DISTRESS SUIT NO 48-4-87
ABDUL MALEK J
30 AUGUST 1988

Landlord and Tenant – Distress – Writ of distress by applicant for recovery of rent due – Application by receiver and manager of respondent for release of goods seized – Allegation of false landlord and tenant relationship – Challenge on validity of appointment of receiver and manager of respondent

The applicant obtained an order upon a certificate of urgency on 5 December 1987 for a writ of distress against the respondent for recovery of rent due in respect of a factory amounting to $720,000 being arrears for December 1986 to November 1987 at $60,000 per month and for the court bailiff to enter the said factory to seize all movable goods therein. The respondent through its receiver and manager had applied, inter alia, for an order that the goods seized be released. At the hearing of the matter, the applicant raised a preliminary objection as regards the validity of the appointment of the receiver and manager of the respondent. On the other hand, counsel for the receiver and manager of the respondent submitted that the alleged landlord and tenant relationship between the applicant and the respondent was false for a number of reasons.

Held, dismissing the application by the receiver and manager of the respondent:

(1) Having considered the arguments, affidavits and authorities, the learned judge was of the view that there was merit in the argument of counsel for the receiver and manager of the respondent. The learned judge came to the inescapable conclusion that there was actually no tenancy agreement between the parties concerned, and that this was an attempt by the applicant to frustrate the actions of the receiver and manager as the applicant had no other remedy in view of the failure in negotiations between the parties.

(2) The learned judge would have allowed the application by the receiver and manager of the respondent if not for the preliminary objection of the applicant with regard to the validity of appointment of the receiver and manager.

(3) The receiver and manager had not been properly appointed as provided for in the deed of debenture between the debenture holder, Bank Pembangunan, and the respondent. With the actual debenture holder itself making an application for the release of the same goods under distress, the receiver and manager as agent of the debenture holder cannot also claim.

(4) The application by the receiver and manager of the respondent was therefore dismissed with costs in the cause. The learned judge also granted an interim stay pending the appeal subject to the applicant applying to set aside the order for the stay.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 378 of 1988.]

MS Murthi for the applicant.
NT Rajah for the receiver and manager of the respondent.

Cur Adv Vult

Abdul Malek J: Vide Originating Summons 31-1596-87 which was applied for ex parte, the applicant had obtained an order upon a certificate of urgency before the learned senior assistant registrar on 5 December 1987 for a writ of distress against the respondent for recovery of rent due in respect of the factory situated on land held under HS(D) KA 1110/74, PT No 69392 Mukim of Ulu Kinta amounting to $720,000 being arrears for December 1986 to November 1987 at $60,000 a month and for the court bailiff to enter the said factory to take possession of all the movable goods therein.

By this summons-in-chambers filed on 14 December 1987 at encl 9 of this distress suit, the respondent through its receiver and manager had applied for an order that the goods seized on 7 December 1987 under the writ of distress be released from seizure, that the costs of the application be borne by the applicant, such other relief as the court deemed fit and that all proceedings be stayed pending the hearing of the application. After a number of postponements, the matter finally came up for hearing on 5 April 1988 when the learned counsel for the applicant raised a preliminary objection as regards the validity of the appointment of the receiver and manager of the respondent. To avoid further postponements, arguments for both the preliminary point and main application were heard together and I propose to deal with the main application first.

Counsel for the receiver and manager of the respondent had submitted that the main issue was the alleged landlord and tenant relationship between the applicant